84-1395

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ALEXANDER L. STEVAS
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IN THE
SUPREME COURT
OF THE UNITED STATES

LOTZ REALTY CO., INC.,
and PAUL K. LOTZ,

Petitioners,

v.

ANTI-DEFAMATION LEAGUE,
NORMAN OLSHANSKY, ET AL,

Respondents.

PETITION FOR CERTIORARI

PETITION NO. _____

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A. QUESTIONS PRESENTED FOR REVIEW.

i) WHETHER THE LOWER COURTS ABUSED THEIR DISCRETION AWARDING FEES UNDER U.S.C. § 1988 TO THE DEFENDANT, ADL, WHEN THERE WAS NO EVIDENCE THAT LOTZ'S 42 U.S.C. § 1983 CASE WAS FRIVOLOUS, UNREASONABLE OR GROUNDLESS OR THAT LOTZ DID NOT HAVE A RATIONAL OR COLORABLE BASIS FOR SUING THE ADL?

ii) WHETHER THE LOWER COURTS ABUSED THEIR DISCRETION AWARDING SAID FEES TO THE ADL WITHOUT ANY FINDINGS OF FACT OR CONCLUSIONS OF LAW DEMONSTRATING THAT LOTZ'S SUIT WAS FRIVOLOUS, ETC.?

B. A LIST OF THE PARTIES TO THE PROCEEDINGS BEFORE THE APPEALS COURT IS CONTAINED IN THE CAPTION OF THE CASE.

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D. OPINIONS BELOW:

The official opinions delivered below pertinent to this Writ consist of the order of the Fourth Circuit Court of Appeals dated December 6, 1984 which affirmed the order of the District Court for the Eastern District of Virginia at Newport News dated January 25, 1984. The last-mentioned District Court opinion was issued on remand from the October 21, 1983 order of the Fourth Circuit directing the District Court to consider an award of attorney's fees to the defendant, ADL, which the District Court had declined to do in its final judgment dated June 23, 1982. In addition, the District Court's order dated March 15, 1982 overruling the ADL's Motion for Summary Judgment is pertinent to the issues raised in the Writ.

E. GROUNDS OF JURISDICTION:

Petitioner asserts error was committed by the Court of Appeals in its order dated December 6, 1984 which sanctioned and affirmed the order of the District Court dated January 25, 1984. This Court has jurisdiction to review orders of the Court of Appeals under 28 U.S.C. §1254(1).

F. PERTINENT STATUTES:

The pertinent statute by which the award of attorney's fees was authorized is 28 U.S.C. §1988. The statute is set forth verbatim in the attached Appendix.

G. STATEMENT OF THE CASE.

This case arises out of a Complaint filed by Lotz Realty Company, Inc. and Paul K. Lotz (hereinafter referred to as "LOTZ") seeking declaratory relief for

vindication of their First Amendment rights pursuant to 42 U.S.C. § 1983. The defendants were The Virginia Real Estate Commission (hereinafter referred to as "VREC"), its Fair Housing Administrator, the Anti-Defamation League (hereinafter referred to as "ADL") and its Regional Director. Appendix at page 6. Initially, the United States Department of Housing and Urban Development (hereinafter referred to as "HUD") had been sued under the Administrative Procedures Act and the Declaratory Judgment Act. A motion for summary judgment on behalf of HUD was granted thereby eliminating HUD and issues under the Administrative Procedures and Declaratory Judgment Act from this case.

This case arose out of LOTZ'S utilization of certain Christian symbols

and slogans in connection with their real estate business. A complaint was filed by the ADL with HUD and the VREC. By letters from the VREC and HUD, LOTZ was advised to cease use of Christian phrases and symbols or to risk loss of his realty license. LOTZ was also advised that the ADL could bring a private suit to enjoin this conduct. Through counsel, LOTZ responded by letter dated December 18, 1980 agreeing to limit usage of Christian phrases or symbols to the phrase "Jesus Is Coming" inside the symbol of a fish with a disclaimer. A copy of the proposed letterhead is attached to the Appendix.

The VREC rejected this proposal and a conciliation meeting was set for March, 1981. The ADL attended the conciliation meeting and was represented by legal Counsel, Ted Bremner. LOTZ was

represented by Paul Lotz, David Lotz and their legal Counsel. HUD also attended the meeting.

At the conciliation meeting, the ADL, and the VREC reiterated their position that usage of Christian symbols or slogans was prohibited under the pertinent Virginia Code section and that LOTZ'S proposed compromise was not acceptable. Through their counsel, LOTZ then inquired whether there was any latitude or flexibility to this position? Specifically, LOTZ inquired whether they might utilize only the symbol of the fish, or only the phrase "Jesus is Coming" or only the phrase "Tell A Friend"? See Joint Appendix 110 (hereinafter referred to as "Appendix followed by the pertinent page citation.")

In response to these questions, the VREC did not respond but deferred to Norman Olshansky of the ADL. Appendix at 107, 110. With respect to each inquiry, Mr. Olshansky indicated that the same would not be deemed acceptable. Appendix at 153. The ADL's negative response was accepted by the VREC. Importantly, Mr. Kast of the VREC testified that if any of these compromises had been deemed acceptable to the ADL that they would have been satisfactory to the VREC. Appendix at 101. Moreover, Mr. Kast confirmed at trial that the fish symbol alone did not cause the VREC any significant problem and that the party who could not agree to its usage "may have been" the ADL. Appendix at 102.

David and Paul Lotz testified that Mr. Olshansky of the ADL was the primary

spokesman for the VREC at the Conciliation Meeting. Both testified that the VREC looked to Mr. Olshansky for responses to proposed compromises and each time accepted his position. Appendix at 109, 110.

After Olshansky rejected their proposals, the VREC, HUD and the ADL adjourned to discuss this matter privately. Appendix at 107 and 110. When they returned, they set forth a series of conditions to which LOTZ was directed to accept to avoid further proceedings. Paul and David Lotz testified that these conditions were later set forth in the written conciliation agreement. Appendix at 108 and 111. Paul Lotz testified that upon their return, Mr. Brenner (the ADL's attorney) spoke for the entire group and "made up the stipulations about minority,

you know advertising, about sensitivity, you know and all the other conditions that are on the form". Appendix at 113. In fact, Mr. Olshansky conceded that the ADL objected to the usage of religious symbols and wanted these prohibited, wanted certain conditions met including, minority recruiting and advertising, sensitivity training and payment of attorneys fees. Appendix at 117-119. David and Paul Lotz testified that these conditions were articulated by Mr. Bremner on behalf of the ADL.

Even the written conciliation agreement was prepared by the ADL by its Counsel, Mr. Ted Bremner. By letters dated March 16 and March 30, 1981, he elicited information from the VREC and HUD as to what terms and provisions they desired to see in the conciliation agreement. Appendix at 135 and 136.

While Mr. Bremner stated that he used a format from a previous conciliation matter occurring in Richmond, it was undisputed that he took full responsibility for preparing the document. Mr. Kast for the VREC testified that the ADL's drafting of the conciliation agreement was unusual and that normally the VREC drafted these agreements after conferring with HUD. Appendix at 103.

The finalized conciliation agreement was forwarded to counsel for LOTZ by Mr. Bremner, Counsel for ADL, via his letter dated April 10, 1981. Appendix at 148. Paragraph 6 of the written Conciliation Agreement provided that LOTZ would have to provide sensitivity training to its personnel under a plan to be approved by the ADL. Appendix at 143. In addition, the ADL

was given an express right to attend all sensitivity training sessions.

Paragraph 9 of the pertinent agreement expressly stated that LOTZ "shall cease and desist" in their advertising from the use of "any words or symbols that have religious connotations including but not limited to a 'fish symbol', etc." For purposes of monitoring compliance, LOTZ was instructed to send copies of all advertising to the VREC and the ADL. Appendix at 144. Finally, paragraph 11 provided for LOTZ to pay the ADL an unspecified attorneys fee for actual fees incurred in pursuing this matter (Appendix at 145) and the ADL was given the right to monitor LOTZ'S overall "compliance with the terms and provisions of this Agreement." Appendix at 133.

Based upon their good faith belief that a compromise was not possible and that their First Amendment rights ought to be decided by the Courts, LOTZ initiated his suit in federal district Court. Appendix at 149-155. The ADL was named as a defendant on the legal theory that they had jointly participated with the State by setting the actual terms of conciliation, preparing the formal, conciliation agreement, and being involved in monitoring and enforcement of the terms of conciliation thereby rendering them a state actor. The legal theory for joint participation rendering one a state actor is well recognized in Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598 (1970); and Lugar v. Edmonson Oil Company, Inc., 639 F.2d 1068, 1069 (4th Cir. 1981), affirmed 102 S. Ct.

2744 (1982). In addition, the ADL was made a party defendant to avoid the possibility of inconsistent judgments, should they bring private suit as LOTZ had been advised they could. See Va. Code § 36-94 and 42 U.S.C. § 3610(d).

After suit was filed, the ADL moved the District Court to grant its motion for summary judgment and dismiss the ADL on the basis that it was not a State actor and/or that it had a privilege to report what it perceived to be discriminatory conduct. Appendix at 57. This motion, along with the other defendants' motions for summary judgment, was heard March 12, 1982. Appendix at 62. The ADL's Motion for Summary Judgment was denied. A copy of that judgment is attached hereto in the Appendix.

During the course of these motions, the District Court commended LOTZ for joining the ADL as a party defendant and approved LOTZ'S joinder of the ADL on the basis that the ADL "have certainly gone far beyond just reporting what they considered an abridgment of the law * * * [they] had to get [their] attorney into the act and that sort of thing." Appendix at 75.

The District Court also seemed to support the propriety of LOTZ'S suit against the VREC and ADL by stating that "They sure hung him before they tried him, didn't they." Appendix at 76.

This case was heard on the merits by the District Court eighteen days later on March 30, 1982. Thereafter, both sides were requested by the District Court to submit extensive briefs to aid the Court in resolving

these issues. See pages 155-156 of the March 30, 1982 proceedings. By a twelve page Memorandum Order dated June 23, 1982 attached hereto in the Appendix, the District Court "abstained on the principle issues in the case" and dismissed the Complaint. Appendix at 163, 174. The court abstained sua sponte. See page 9 thereof. The Court expressly declined to state an opinion on the merits of the controversy. See page 5 of the opinion. Nowhere therein did the Court find LOTZ'S case to be frivolous.

The ADL filed an appeal from the denial of attorney's fees. The Fourth Circuit remanded to the District Court to consider the issue by an opinion dated October 21, 1983. A copy is attached to the Appendix. Nowhere therein was LOTZ'S case found to be

frivolous. The District Court awarded fees to the ADL by order dated January 25, 1984. The District Court made no findings of fact indicating frivolousness, etc. and no conclusions of law except to state that LOTZ'S case was "without merit". See page 8 thereof. No explanation was given why the claim was without merit or how it became non-meritorious during the 18 day interim from motions to trial. This Order was affirmed without explanation by order of the Fourth Circuit dated December 6, 1984. A copy of the same is attached to the Appendix.

Meanwhile, the lawfulness of LOTZ'S proposed letterhead was being determined by an action in the State Court to enjoin LOTZ from using his proposed letterhead following the District Court's abstention order.

Appendix at 20. LOTZ counterclaimed contending that they had a First Amendment right to utilize the said advertisement. This issue was decided in favor of LOTZ by a memorandum Order dated May 16, 1984. A copy of that Order is attached to the Appendix. That LOTZ won on the merits was brought to the attention of the lower Courts.

J. ARGUMENTS OF LAW.

i) THE LOWER COURTS ABUSED THEIR DISCRETION AWARDING THE ADL FEES WHEN THERE WAS NO EVIDENCE THAT LOTZ'S SUIT WAS FRIVOLOUS, ETC. OR LACKED A RATIONAL BASIS FOR INCLUDING THE ADL.

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings by affirming and sanctioning the District Court's order awarding the defendant fees as to require an exercise of this

Court's supervisory powers. Under the facts of this case, such an award is patently unfair and calculated to establish a dangerous, chilling effect on all § 1983 claimants.

It is well-established that an award of attorneys' fees to a defendant in a 1983 action is discretionary with the trial Court and only appropriate if "the District Court finds that the plaintiffs' action was frivolous, unreasonable or without foundation." Christiansburg Garment Co., v. E.E.O.C., 434 U.S. 412, 421, 98 S. Ct. 694, 700 (1978) at 700 and 421. In Hughes v. Rowe, 449 U.S. 514, 66 L.Ed. 2d 163, 172, 101 S.Ct. 173 (1980), this Court went so far as to reverse an award of attorney's fees by the District Court affirmed by the Appeals Court to the defendant even though plaintiff's suit in

that case had been dismissed for failure to state a claim upon which relief could be granted without any trial on the merits. The Supreme Court stressed that such an award should only be granted in rare instances and "the fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees." 66 L.E.2d at 172-173.

This Court in Hughes went on to stress that a case cannot be meritless if it "deserved and received careful consideration of both the District Court and the Court of Appeals." 449 U.S. at 15, 101 S. Ct. at 173. In a footnote, this Court emphasized that the plaintiff's case in Hughes had been dismissed by the district court "only after detailed consideration resulting

in a seven-page opinion. 449 U.S. at 15, 101, S. Ct. at 173, f.n. 13.

In addition, the lower courts were bound to view the reasonableness of suit against the ADL from the perspective whether LOTZ had a rational or arguable claim against the ADL. To do otherwise would engage in the type "post hoc reasoning" condemned in Christiansburg Garment, supra, 98 S. Ct. at 700, 434 U.S. at 421-422. Following this rationale, the Fifth Circuit Court of Appeals reversed the district Court's fee award in Jones v. Texas Tech University, 656 F.2d 1137, 1145 (5th Cir. 1981), stressing that the "district court must focus on the question whether the case is so lacking in arguable merit as to be groundless or without foundation rather than whether

the claim was ultimately successful." (emphasis in original).

Similar fee requests have been rejected by the following, respective Courts on the following grounds: Bowers v. Kraft Foods Corp., 606 F.2d 816, 818 (8th Cir. 1979) (". . . the evidence, while weak, was sufficient to conceivably have influenced Bowers to believe that she had a stronger case. (emphasis added); Dee v. Institutional Networks Corp., 559 F. Supp. 1282, 1287 (S.E. N.Y. 1983) ("cannot say that plaintiff did not have a reasonable ground for maintaining this suit"); E.E.O.C. v. Pet Inc., Funsten Nut Div., 543 F. Supp. 911, 913 (M.D. Ala. N.D. 1982) (In making the determination as to reasonableness or frivolousness of suit, the district court "must view the available evidence and the applicable

law in a manner most favorable to plaintiff") (emphasis added); Eliason Corp. v. Bureau of Saf. and Reg. of Mich., 564 F.Supp. 1298, 1309 (W.D. Mich. S.D. 1983) ("Once a plaintiff has demonstrated . . . a rational basis for believing that a particular individual may have been involved in the incident involved in the Complaint, this Court will not award attorneys fees simply because that belief proved inaccurate") (emphasis added); Watson v. Republic Airlines, Inc., 553 F. Supp. 939, 947 (N.D. Ga. 1982) ("Plaintiff, in the case at bar, had some basis for concluding that the law . . . might allow her to prevail on her claim . . . ."); Pippin v. United States Truck Co., Inc., 520 F. Supp. 144, 150 (E.D. Mich. S.D. 1981) (". . . This Court indeed finds that

plaintiff's claim was not a frivolous one but was colorable in the law").

In the case at bar and viewing the evidence in the light most favorable to LOTZ as the lower courts should have, LOTZ had a rational basis to believe that the ADL was jointly or willfully participating or sharing in the administrative decision-making process by dictating the terms of conciliation and dominating the official conciliation process. The ADL appeared to decide what was acceptable and what was not. The ADL appeared to dictate the bulk of the terms of the conciliation agreement. The ADL physically prepared the document itself, contrary to the normal practice. The VREC even told LOTZ they would be satisfied with any solution acceptable to the ADL. Clearly, this statement alone gave rise to a reasonable belief that the

official, decision-making process was being shared. Moreover, this evidence warranted LOTZ'S belief that the ADL had moved from the role of a mere reporter to that of a participant. A mere reporter would not attend the official conciliation proceedings with their attorney and dictate the terms for conciliation. Eighteen days before trial, even the District Court agreed that the ADL had moved far beyond the role of reporter and that LOTZ'S suit against the ADL was justified. Surely such assurances by the District Court so shortly before trial negate any finding of frivolousness absent a change of circumstances from that time forward demonstrating that the suit subsequently became frivolous.

Moreover, LOTZ had a reasonable basis to conclude the suit against the

ADL would promote judicial economy by bringing all parties together so as to avoid the potential for inconsistent judgments. The District Court also recognized the value of this approach and lauded LOTZ for the same only eighteen (18) days before trial.

If LOTZ'S suit was frivolous, why did the District Court overrule motions for summary judgment, approve the same and compliment LOTZ for bringing the action? Most, if not all, courts passing on this issue have agreed that evidence sufficient to justify a trial on the merits constitutes strong, if not conclusive, evidence that the claim is not frivolous. A recent survey of cases on point and statement of this rule is found in Soto v. Romero Barcelo, 559 F. Supp. 739 (D.Puerto Rico 1983). There, the Court held: "In general, the

courts addressing this issue have held that attorney's fees should be awarded to prevailing defendants where their opponents cannot produce credible evidence in opposition to summary judgment motions or at trial on the merits. Where a plaintiff proceeds on the strength of allegations, which are unsupported and indeed contradicted by unrebutted deposition testimony, attorney's fees should be awarded to a defendant who obtains summary judgment in his favor." 559 F. Supp. at 743. See also, Larson v. Wind, 548 F. Supp. 479, 480 (N.D. Ill. E.D. 1982); Bennett v. Cramer, 495 F. Supp. 191, 193 (E.D. Wis. 1980); Kaimowitz v. Howard, 547 F. Supp. 1345, 1350-1351 (E.D. Mich. 1982); and Laskowski v. Lepine, 462 F. Supp. 346, 348 (E.D. Wis. 1978).

Should a § 1983 claimant be forced to pay defense fees when the district court approves and commends his suit shortly before trial? Can a suit be frivolous when the district Court denies motions for summary judgment, requests extensive briefs, writes a long and detailed twelve page opinion and then abstains due to the novelty of the issues? This Court in Hughes, supra. expressly stated that even a seven page opinion demonstrated that the claim was carefully considered and therefore not frivolous.

LOTZ respectfully submits that the evidence in this case clearly shows that LOTZ suit was not frivolous and that the lower courts abused their discretion awarding fees against LOTZ. If LOTZ can be subjected to fees under these facts, any unsuccessful § 1983 claimant can be

assessed with fees. Thus, the result of not reversing the lower courts would magnify the fears expressed in Hughes and Christiansburg, supra. concerning post hoc reasoning and the attendant chill undermining all § 1983 litigation.

ii. THE LOWER COURTS ABUSED THEIR DISCRETION AWARDING SAID FEES TO THE ADL WITHOUT ANY FINDINGS OF FACT OR CONCLUSIONS OF LAW DEMONSTRATING LOTZ'S SUIT TO BE FRIVOLOUS, ETC.

LOTZ would stress that neither the opinions of the District Court nor Appeals Court contain any findings of fact or conclusions of law setting forth how or why LOTZ'S claim against the ADL was frivolous, etc. The January 25, 1984 opinion by the District Court is the only one that even touches this issue. Therein, the District Court merely states

that LOTZ'S claim is "without merit" -- a characteristic of all suits that fail.

The lower courts were obligated to set forth in clear detail how and why LOTZ'S suit was frivolous, etc. This Court has expressly recognized this requirement in Hensley v. Eckerhart, _____ U.S. _____, 76 L.Ed. 2d 40, 103 S. Ct. _____ (1983). There, this Court stressed that it "remains important . . . for the district court to provide a concise but clear explanation of its reasons for the fee award." 76 L.Ed. 2d at 53.

Appellate Courts reversing district Courts for failure to make such findings include: Jones v. Texas Tech University, 656 F.2d 1137, 1146 (5th Cir. 1981); and White v. South Park Independent School Dist., 693 F.2d 1163, 1170 (5th Cir. 1982); Equal Employment

Opportunity v. Fruehauf Corp., 609 F.2d 434, 436 (10th Cir. 1979); and Anthony v. Marvin County General Hospital, 617 F.2d 1164, 1170 (5th Cir. 1980). Other appellate cases upholding fee awards because of specific finding by the district Court are: Glass v. Pfeffer, 657 F.2d 252, 256-257 (10th Cir. 1981); and Tonti v. Petropoulous, 656 F.2d 212, 217 (6th Cir. 1981). See also, Cohn v. Papke, 655 F.2d 191, 195 (9th Cir. 1981) (f.n. 3) where the appeals Court stressed that the district Court "should make findings of fact and conclusions of law detailing the basis for his decision."

In the case at bar, no facts existed to justify the fee award granted the ADL. This is high-lighted by the fact that the lower Courts could make no such findings. Lacking any evidence of frivolousness or

any finding to support the award to the ADL, the lower Courts have abused their discretion and should be reversed.

K. CONCLUSION

For all the reasons aforesaid and others deemed appropriate by this Court, LOTZ respectfully moves the Court to grant his Writ and to reverse the lower courts for abuse of discretion in allowing fees to the defendant, ADL. While LOTZ'S § 1983 case was unsuccessful in federal court, LOTZ did prevail in the State Courts to whom the case was directed. Moreover, LOTZ'S federal suit had sufficient merit to overcome motions for summary judgment and to merit careful and detailed consideration in a 12 page opinion by the District Court. At no time did any of the lower courts make any findings of fact showing the case to be frivolous, etc. In fact, the District

Court applauded LOTZ for joining the ADL since they had gone far beyond merely reporting the alleged violation. Clearly under the facts of this case, the award to the ADL was error and this Court ought to act to correct the same. Should the Court not act in this case, LOTZ respectfully submits that all § 1983 claimants will be chilled by the prospect of adverse fee awards should they ultimately lose their case. More importantly, LOTZ respectfully submits that this Court will have lost an ideal opportunity to end an unfortunate trend in the lower courts to employ a "post hoc" reasoning when considering fees as forewarned by this Court in Christiansburg, supra.

LOTZ REALTY COMPANY, INC.
and PAUL K. LOTZ

By Sidney H. Kirstein
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L. CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he mailed three (3) true copies of the foregoing Petition for Certiorari to Paul M. Lipkin, of Goldblatt, Lipkin, Cohen, Anderson, Jenkins & Legum, 415 St. Paul's Blvd., Suite 609, P. O. Box 3505, Norfolk, Virginia 23514-3505, by depositing the same in the regular manner in the United States mail, first class, postage prepaid, at Lynchburg, Virginia on the 1st day of March, 1985.

Sidney H. Kirstein
Sidney H. Kirstein

M. APPENDIX

1. 42 U.S.C. § 1988

2. 42 U.S.C. § 3612(a)

3. CODE OF VIRGINIA, § 36-95(b)

4. MARCH 15, 1982 ORDER OF U. S. DISTRICT COURT.

5. JUNE 23, 1982 ORDER OF U.S. DISTRICT COURT

6. SEPTEMBER 19, 1983 ORDER OF FOURTH CIRCUIT

7. JANUARY 25, 1984 ORDER OF U. S. DISTRICT COURT

8. DECEMBER 6, 1984 ORDER OF FOURTH CIRCUIT

9. MAY 16, 1984 ORDER OF STATE COURT

42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes

of the State wherein the court having jurisdiction of such civil or criminal cause is held so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the

costs. (As amended Oct. 21, 1980, P.L. 96-481, Title II, § 205(c), 94 Stat. 2330.)

42 U.S.C. § 3612(a)

(a) Civil Action - Federal and State Jurisdiction - Complaint - Limitations - Continuance pending conciliation efforts - Prior bona fide transactions unaffected by court orders. The rights granted by section 803, 804, 805, and 806 [42 USCS §§ 3603-3606] may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: Provided, however, That the court shall continue such civil case brought pursuant to this section or section 801(d) [42 USCS § 3610(d)]

from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court: And provided, however, That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act 18 USCS § 231-233, 241, 242, 245, 1153, 2101, 2102; 25 USCS §§ 1301-1303, 1311, 1312, 13231-1326, 1331, 1341; 42 USCS §§ 1973j, 3533, 3535, 3601-3619, 3631], and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence

of the filing of a complaint or civil action under the provisions of this Act [18 USCS §§ 231-233, 341, 242, 245, 1153, 2101, 2102; 25 USCS §§ 1301-1303, 1311, 1312, 1321-1326, 1331, 1341; 42 USCS §§ 1973J, 3533, 3535, §§ 1973J, 3533, 3535, 3601-3619, 3631] shall not be affected.

CODE OF VIRGINIA, § 36-95(b)

§ 36-94. Powers of Virginia Real Estate Commission; action by private person for injunction and liquidated damages.

(b) Any person adversely affected by the use of a discriminatory practice prohibited under this chapter may institute an action for injunctive relief and money damages against the person responsible for such discriminatory practice in the circuit court of the county or city in which such practice was employed. If the court finds that the defendant was responsible for such a practice, and that the plaintiff was adversely affected thereby, it shall enjoin the defendant from use of such practice, and in its discretion award the plaintiff actual damages with court costs and reasonable attorney's fees.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

(FILED 3/15/82)

LOTZ REALTY CO., INC.,)
and PAUL K. LOTZ,)

Plaintiffs,)

v.

UNITED STATES DEPARTMENT OF)
HOUSING AND URBAN DEVELOPMENT;)
and MR. WILLIAM J. PELLE, JR.;)
and VIRGINIA REAL ESTATE)
COMMISSION; and)
RICHARD C. KAST; and)
ANTI-DEFAMATION LEAGUE; and)
NORMAN OLSHANSKY,)

Defendants.)

CIVIL ACTION NO. 81-82 NN

OPINION AND ORDER

I.

This matter comes before the Court on the motions for summary judgment of the United States Department of Housing and Urban Development (HUD) and of the Anti-Defamation League (ADL).

II.

In the course of their real estate business, plaintiffs employed certain advertisements and stationery which incorporated Christian slogans and symbols. Suspecting that these slogans and symbols might violate a provision of the Fair Housing Act, the ADL and Norman Oishansky filed a complaint with HUD. The federal agency, pursuant to 42 U.S.C. § 3610(b), promptly referred the complaint to the Virginia Real Estate Commission (REC).

By letter dated October 28, 1980, the REC informed plaintiffs that their advertising and stationery violated the Virginia Fair Housing Law. The REC recommended that plaintiffs refrain from further use of the Christian slogans and symbols, and it threatened to revoke or suspend plaintiffs' real estate license

for noncompliance. The REC failed to obtain voluntary compliance with its directives, however, and HUD reactivated the complaint in December 1980.

Pursuant to its statutory mandate under 42 U.S.C. § 3610(a), HUD endeavored to resolve the complaint through "informal methods of conference, conciliation, and persuasion." (Ex. C). Plaintiffs offered during the conciliation process to limit their use of Christian slogans and symbols to the slogan "Jesus is Coming" and the symbol of a fish. They further offered to include a disclaimer of any intent to discriminate on religious or other grounds. All defendants rejected this offer at a conciliation meeting on March 11, 1981, an they advised plaintiffs that any use of religious slogans and symbols was unacceptable. Plaintiffs

subsequently brought the instant action for a declaratory judgment that would establish their right under the First Amendment to use Christian slogans and symbols in their advertising and stationery.

III.

1. HUD

HUD has asked the Court to grant its motion for summary judgment on the grounds that this action is not ripe for judicial review. In support of this motion, HUD notes that the enforcement scheme of the Fair Housing Act involves a two-step administrative process. HUD must first attempt to resolve a complaint through informal measures. See 42 U.S.C. § 3610(a). If informal methods fail to secure compliance, HUD may then refer the action to the Attorney General who makes an

independent investigation to determine whether there is reasonable cause to believe that a violation of the Act has occurred. See 42 U.S.C. § 3613. Under the terms of this two-step process, HUD observes, the agency has no enforcement power to fix any binding legal obligations.

The law is well-settled that judicial review of administrative action must await final agency action. See, e.g., FTC v. Standard Oil Co., 449 U.S. 232, 246 (1980); Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967). The Fourth Circuit has interpreted the concept of finality to mean "the fixing of obligations or legal relationships." See Georator Corp. v. EEOC, 592 F.2d 765, 768 (4th Cir. 1979). This Court must determine,

accordingly, whether HUD's "determination to resolve" firmly and finally fixes a legal obligation.

In Georator the plaintiff sought judicial review of the EEOC's "reasonable cause" determination that plaintiff had engaged in discriminatory employment practices. The district court dismissed the action for lack of subject-matter jurisdiction, and the plaintiff appealed. The Fourth Circuit rejected the appeal, noting that the EEOC's determination of reasonable cause was "lifeless and [could] fix no obligation nor impose any liability on the plaintiff." 592 F.2d at 768. The Court of Appeals insisted that the EEOC's reasonable-cause determination was not final because it was "merely preparatory to further proceedings." Id.

Applying the reasoning of the Fourth Circuit in Georator, the Court believes that HUD is entitled to prevail on its motion for summary judgment. HUD's "determination to resolve," like the EEOC's determination of reasonable cause, neither fixes obligations nor imposes liability. Only the Attorney General, after an independent investigation, may secure through an injunction or restraining order "the full enjoyment of the rights" granted by the Act. See 42 U.S.C. § 3613. Inasmuch as HUD has not even referred this action to the Attorney General, the Court concludes the plaintiff's claims against the federal defendants are premature. Accordingly, the Court GRANTS the federal defendants' motion for summary judgment.

2. ADL

The ADL and Norman Olshansky have asked the Court to grant their motion for summary judgment on the grounds that they are private parties who are not subject to suit under 42. U.S.C. § 1983. They submit that the mere filing of a discrimination complaint with a state agency does not demonstrate the requisite "color of state law."

Upon review of the relevant law, the Court fully accepts the ADL's argument that purely private parties do not act under color of state law merely be invoking state administrative or judicial processes. See Lugar v. Edmondson Oil Co., 639 F.2d 1058, 1069 (4th Cir. 1981). We note, however, that private parties who jointly participate with state official in impermissible conduct may be subject to suit under

§ 1983. If a private actor usurps the official power of a state official authority to a private party, the private actor would be subject to the provisions of § 1983. See generally id. at 1068-69.

Because the extent of a private actor's joint participation in official state actions is a question of fact, the Court believes that this question is not appropriate for resolution on a motion for summary judgment.[1]

IV.

In accordance with all of the foregoing, the Court DISMISSES HUD and the federal defendants from this action.

_____
United States District Judge

March 15, 1982
Norfolk, Virginia

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[1] The ADL and Olshansky have asked the Court to grant their motion on the additional grounds that they had a privilege to invoke the administrative and judicial process. Denial of their motion, they assert, would "chill" their right to seek redress from the courts. We reject their argument in this case because the plaintiffs seek no monetary damages.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

LOTZ REALTY CO., INC., and PAUL K. LOTZ,	]	
Plaintiffs,	]	FILED JUNE 23, 1982
v.	]	
VIRGINIA REAL ESTATE COMMISSION; and RICHARD C. KAST; and ANTI-DEFAMATION LEAGUE; and NORMAN OLSHANSKY,	]	CIVIL ACTION NO. 81-82-NN
Defendants.	]	

MEMORANDUM ORDER

Plaintiffs are engaged in the real estate business in Virginia, and duly licensed by the Virginia Real Estate Commission (VREC). In 1980 a series of complaints were filed with the Department of Housing and Urban Development (HUD) and VREC by Anti-Defamation League (ADL) and Norman Olshansky, its Regional Director, asserting plaintiffs were

violating the Fair Housing Act, 42 U.S.C. § 3601 et seq., and the Virginia Fair Housing Law, Virginia Code § 36-86 and subsequent sections, by improper advertisements. HUD referred the complaints to VREC, which commenced an investigation. VREC subsequently found "reasonable cause" to believe that the advertising by plaintiff was contrary to the law. Thereafter HUD made a determination to resolve the case by conciliation, and VREC joined with it in this endeavor. A conciliation conference was scheduled and held. ADL and its Regional Director and counsel attended the meeting. Plaintiffs made an offer to amend or change certain of its advertising, but the modification was not acceptable. ADL's counsel agreed to and did prepare a proposed conciliation agreement, many of the

terms of which were requested by HUD, and submitted it to plaintiffs' counsel for approval. This action followed.

Since the filing of this suit neither HUD nor VREC have taken any action on the administrative complaints, nor have they referred the matter to the Department of justice or the Attorney General of Virginia, respectively, for any possible action. Neither HUD nor VREC have direct enforcement power under their respective Fair Housing Acts.

There is little or no dispute in the material facts of the case. The dispute between the parties is over the interpretation of the wording and symbol of the plaintiffs' advertising.

I.

Plaintiffs ground this action in 4 U.S.C. § 701 et seq., the Administrative Procedure Act, 28 U.S.C. § 2201,

the Declaratory Judgment Act, and 42 U.S.C. § 1983, The Civil Rights Act of 1871. They pray the Court to (1) declare plaintiffs have a constitutionally protected right to employ Christian slogans and symbols in the operation of their real estate business, so long as they do not discriminate or evidence an intent to discriminate; (2) permanently enjoin defendants from threatening or bringing further complaints or administrative proceedings against them in the basis of Christian advertising; and (3) award them their costs and attorney's fees for bringing this suit.

Plaintiffs contend that they have a constitutional right to employ the Christian slogans and symbols in their real estate business, that it constitutes a permissible form of commercial speech, and that absent

evidence of discrimination or intent to discriminate they cannot be constitutionally deprived of this privilege.

Prior to trial of this action, the motion of HUD and defendant Pelle, Jr. for summary judgment was granted and they were dismissed. The action proceeded to trial as to the other defendants.

Between the time of filing of the complaint and trial, the relief sought has somewhat changed. On October 6, 1981, plaintiffs filed their formal statement setting forth that the issue in the case was -

> Is the Christian advertising and slogans attached to the plaintiffs' complaint as Exhibit F discriminatory per se based upon 42 U.S.C. § 3604(c) and/or Virginia Code § 36-88(3)?

In the final pretrial order of March 12, 1982, plaintiffs set forth the tryable issues as -

A. May the mere use of Christian symbols or slogans by plaintiffs in the course of their real estate business as reflected in Plaintiffs' Exhibit F, be prohibited as discrimination per se under 42 U.S.C. § 3604(c) and/or Virginia Code § 35-88(3)?

B. Have HUD and the (V)REC arrived at a sufficiently clearcut position on a legal issue as to make this a case "ripe" for judicial review?

C. Are the ADL and/or Norman Olshansky active and joint participants in arriving at the administrative decision by the (V)REC so as to render them amenable to suit under 42 U.S.C. § 1983?

In their opening brief filed herein, plaintiffs say the issues before the Court are -

1. Whether this action is a case or controversy within

the meaning of Article III of the Constitution?

2. Whether this action is otherwise ripe for review?

3. Whether Virginia Code § 36-88 (3) can be constitutionally applied so as to proscribe use of P/T Exhibit 47, absent proof of actual discrimination, limitation or preference?

4. Whether the ADL has acted as a joint participant or in concert with the (V)REC so as to render itself subject to the Court's jurisdiction as a State actor under 42 U.S.C. § 1983?

5. Whether the defense of good faith or privilege is available to either defendant in an action seeking pure declaratory relief?

It appears here that plaintiffs no longer contend there is any jurisdiction under 5 U.S.C. § 701 et seq., the Administrative Procedure Act. Administrative procedures have not yet been exhausted and therefore the action is

not ripe for Court review. Though HUD and Pelle had not been dismissed at the time of the Final Pretrial Conference Order, it appears no relief was sought or contemplated against the federal defendants.

II.

Turning first to the § 1983 action,[1/] defendants ADL and Olshansky assert there has been no showing of State action on their part, and that even if there has been, plaintiffs have shown no damages; nor have they suffered any injury. Each defendant asserts

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1/ A § 1983 action does not lie against federal agencies or officials. District of Columbia v. Carter, 409 U.S. 418 (1973). Such is of no moment here because the federal defendants have been dismissed from the suit.

there has been no action prohibited by § 1983.

Plaintiffs' assert that ADL and Olshansky violated their constitutional rights when they filed claims contending they were violating the federal and state Fair Housing laws, and that defendants conspired to deprive them of their rights thereby.

The facts establish that defendant Olshansky received a complaint concerning an advertisement of plaintiffs' business. Pursuant thereto he submitted the complaint to HUD and VREC, and subsequently submitted other complaints. HUD referred the matter to VREC. VREC, after investigation, found probable cause to believe the complaints merited further action. HUD agreed and made a determination to resolve the issue. A conciliation conference was arranged.

Defendants attended. ADL's counsel was there and undertook to draft a conciliation agreement. Plaintiffs assert that defendants acted in concert to deprive them of their rights, privileges and immunities secured by the Constitution, in that they sought to prevent them from using the Christian slogans and symbols in question.

The evidence is totally lacking of any improper conduct or malice on the part of any defendant. The procedure which defendants followed is provided by federal and state statutes and regulations, none of which have been declared unconstitutional. Defendants chose one of the provided means to have a proper determination of whether plaintiffs were in violation of the statutes and regulations. There has yet been no determination as to whether the

plaintiffs or defendants are correct in their contention and interpretation of the use of the words and symbols. Without a showing of malice, regardless of the determination of which contention is correct, there can be no liability on defendants under the facts of this case. They were acting under and pursuant to an Act of Congress, and an Act of the Virginia Legislature which are presumed to be constitutional. There are several reasons why plaintiffs may not recover in this case under § 1983. First, they were acting in a quasi judicial proceeding. Adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those that participate in such adjudication should also be immune from suits for damages. Butz v. Economou, 438 U.S. 478, 513,

98 S.Ct. 2894, 2914 (1978). Persons "performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts," Id. 438U.S. at p. 516, 98 S.Ct. at 2915, and "there is no basis for according to federal officials of higher degree of immunity . . . than is accorded state officials . . . ." 438 U.S. at 500, 98 S. S.Ct. at 2907. So that state officials "will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law." Butz v. Economou, supra, 438 U.S. at 507, 98 S.Ct. at 2911. Secondly, it is now clear that when one acts under a statute that he reasonably believes to be valid even if later declared to be unconstitutional, on its face or as applied, he is not

liable in damages. Wood v. Strickland, 420 U.S. at 317, 95 S.Ct. at 998 (1975). See also Pierson v. Ray, 386 U.S. at 555, 87 S.Ct. at 1218 (1967). To establish liability plaintiff must show that defendant "knew or reasonably should have known that the actions they (he) took within their (his) sphere of . . . responsibility would violate the constitutional rights of (plaintiffs), or . . . they (he) took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to (plaintiffs)." Wood v. Strickland, 420 U.S. at 322, 95 S.Ct. at 1001 (1975); O'Connor v. Donaldson, 422 U.S. at 577, 96 S.Ct. at 2494 (1975).

VREC and Kast were acting in their official capabilities and within the provisions of the statute, which statute

parallels the statute enacted by Congress, and in a quasi judicial capacity. There is no evidence any defendant was acting with a malicious motive or beyond what, in good faith, each thought was within the provisions of the statute. Thirdly, there is no showing that the action taken by defendants "subjects or causes to be subjected . . . (plaintiffs) to the deprivation of any rights, privileges or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. See Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598 (1976). What defendants have attempted to do is conciliate an issue in a manner provided by law. There is no showing, as is required by the statute, of the second essential element to a § 1983 action, that "this conduct deprived a person of rights, privileges

or immunities secured by the Constitution or laws of the United States." Parrott v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 at 1913 (1981).

The allegations in this case of actions and conduct of defendants said to be in violation of § 1983 is an alleged conspiracy. A conspiracy is an agreement between two or more persons to do an unlawful act, or to do a lawful act in an unlawful way or manner, to the injury of another. A conspiracy does not exist where both the object of the agreement and the means contemplated for its achievement are lawful. 16 Am. Jur. 2d p. 267, Par. 49, subject Conspiracy. "Concert of action is a conspiracy, if its object is unlawful or if the means used are unlawful." Truay v. Corrigan, 257 U.S. 312, 327, 42 S.Ct. 124, 127

(1921); United States v. Britton, 108 U.S. 199, 2 S.Ct. 531.

Plaintiffs do not seek damages. However, § 1983 confers authority to grant equitable relief, but its words "allow a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding. Giles v. Harris, 189 U.S. 475, 486, 23 S.Ct. 639, 642 (1903)." "In an action between private individuals, it has long been held that an injunction is to be used sparingly, and only in a clear and plain case." Rizzo v. Goode, Supra, 423 U.S. at 378, 96 S.Ct. at 607. The "principles of equity . . . militate heavily against the grant of an injunction except in the most extraordinary circumstances," Id., 423 U.S. at 379, 96 S.Ct. at 508, and such principles

apply where an injunction is sought "against those in charge of an executive branch of an agency of state or local governments . . . ." Id.

Lastly, there has been no final determination by VREC of the issue and no basis for plaintiffs to assert they have been subjected to or caused to be subjected to a deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States.

Money damages are not sought, and since there is nothing to indicate VREC will call upon the Attorney General of Virginia to institute action against plaintiffs, and inasmuch as plaintiffs can raise the same defense if any such action is instituted. injunction should not be issued by this Court. The State should be given the first opportunity to

deal with the question of whether the actions and conduct of plaintiffs violate the state statute, and whether the state statute is constitutional. The § 1983 action must therefore be dismissed.

III.

Turning to the issue of declaratory judgment, defendants question whether the plaintiffs have standing to maintain this action, and whether the issue is ripe for decision.

At this point nothing has been done except an effort made to conciliate the questions raised. VREC has no enforcement power.[2/] If it has

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2/ Virginia Code §§ 36-94 and 36-95. A decision of the Circuit Court of the City of Richmond, Case No.

(continued on page 19)

reasonable cause to believe that civil action is necessary to preserve the status quo or prevent irreparable harm, or that there has been a violation of the Act, it may request the State Attorney General to file a civil action. The matter has not been referred to the Attorney General nor has there been any suggestion the matter is likely to be referred. But, if it is, plaintiffs can raise the issues suggested here and any other defenses they may have. There is here no threat of such an action.

This Court ought not to attempt by declaratory judgment, or otherwise, to

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2/ (continued from page 18) B-1324 and No. 78-1265, Elam & Funsten, Inc., et al v. Ruth J. Herrick, etc., and Harold E. Stillings v. Ruth J. Herrick, etc., holds the Commission has no power of enforcement.

deal with whether a state statute is constitutional until the state authorities have had an opportunities to do so. A decision by the state authorities might well eliminate the necessity of this Court's making any ruling on the question.

First, assuming standing and an existing issue, this Court should abstain. Though neither party has suggested abstention, it is an issue which the Court may raise sua sponte. Bellotti v. Baird, 428 U.S. 132, 143, 96 S.Ct. 2857, 2864 (1976), F.N. 10. "Abstention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.'"

[citations omitted]. Bellotti v. Baird, supra, 428 U.S. at 147, 96 S.Ct. at 2866. See also Harris County Commissioner Court v. Moore, 420 U.S. 77, 84, 95 S.Ct. 870, 875-876 (1975). The matters here dealt with are "matters of first impression under state law and should be resolved by the state courts." North v. Budig, 637 F.2d 246, 249 (4th Cir. 1981). This Court should stay its hand in order to provide the state courts an opportunity to settle the issues "since a decision by the local tribunal could afford (plaintiffs) an adequate remedy and thus preclude the possibility that the federal court might unnecessarily decide a constitutional issue." Id. 637 F.2d at 249. In Simopoulos v. Virginia State Board of Medicine, 644 F.2d 321, 325 (4th Cir. 1981), Judge Russell in

his clear and usual scholarly opinion pointed out that the Supreme Court has extended the doctrine of abstention beyond the "principles of private equity jurisprudence and rested primarily on comity;" that the Supreme Court has said that it is "a proper respect for state functions, . .. and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate ways." Juidice v. Vail, 430 U.S. 327, 334, 97 S.Ct. 1211, 1216 (1977). If the issue is left for the State courts in the first instance, and "the State construes its statute so as to remove any constitutional problems, friction with the State will have been avoided." Carey v. Sugar, 425 U.S. 73, 79, 96 S.Ct. 1208, 1211 (1976).

The doctrine of abstention applies alike to administrative proceedings as well as court proceedings. Huffman v. Pursue, 420 U.S. 592, 607 95 S.Ct. 1200, 1209 (1975); Simopoulos v. Virginia State Board of Medicine, supra, 644 F.2d at 329-330.

In the event the State continues with the administrative proceedings or the Attorney General brings a civil action, plaintiffs can raise the issues here sought to be raised, for no more is required to invoke the Younger doctrine that the "opportunity to present their federal claims in the state proceedings." Juidice v. Vail, supra, 430 U.S. at 337, 97 S.Ct. at 1218.

The question of standing to maintain the declaratory judgment action has been raised and dealt with in the

briefs. Plaintiffs assert that proceedings may be instituted to suspend or revoke their license to deal in real estate and therefore it is necessary that they have a determination as to whether their continued use of the slogans and symbols is prohibited by the Virginia statute. However, whatever action may be taken by VREC, it cannot deprive plaintiffs of their license. Pursuant to 36-95.2 of the Code of Virginia before a real estate license issued pursuant to the provisions of Chapter 18 of Title 54 of the Virginia Code may be revoked, plaintiffs must first have been found by a court to have violated a provisions of the Fair Housing Law, and certified by the Attorney General to have been so found, after which the licensing agency must give such party notice before

considering a suspension or revocation. At this point it cannot be said conciliation has failed or that it may not succeed. Nor can it be said that if conciliation fails the matter will be referred to the Attorney General, or that if referred a court will find plaintiffs in violation of the Fair Housing Law, or what will follow. To invoke the jurisdiction of the Court there must be an actual case of continuing controversy, an actual direct injury or a genuine threat, which must be demonstrated, and a reasonable likelihood of actual injury, and a stake in the outcome. O'Shea v. Littleton, 414 U.S. 488, 499, 94 S.Ct. 669. The injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical." Id. Past exposure to illegal conduct does not in itself

show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." Id.

But, the Court need not determine whether plaintiffs have standing in view of the decision to abstain.

IV.

Defendants ADL and Olshansky pray that they be awarded their attorneys' fees in this case. The Court need not here set forth the types of cases and bases on which attorneys' fees may be awarded. Pursuant to 42 U.S.C. § 1988, the Court may award attorneys' fees in a § 1983 case. But here the § 1983 claim was an adjunct to the declaratory judgment action. Secondly, there is not at this point sufficient information before the Court to determine this issue or the amount which might be proper to

award. Inasmuch as the Court has abstained on the principle issues in the case, it cannot be said defendants have prevailed on all issues, or that grounds for awarding defendants attorneys' fees and costs exist. The Court therefore declines to consider this issue.

The complaint is therefore DISMISSED.

/Richard B. Kellam/
United States District Judge

Norfolk, Virginia
June /23rd/, 1982

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(PUBLISHED) FILED OCT. 21, 1983
W. FARLEY POWERS, JR., CLERK
U. S. DISTRICT COURT
NEWPORT NEWS DIVISION

No. 84-1321

Lotz Realty Co., Inc.
and Paul K. Lotz, Appellees,

-v-

United States Department of
Housing and Urban Development;
Mr. William J. Pelle, Jr.;
Virginia Real Estate Commission;
Richard C. Kast;

and

Anti-Defamation League
and Norman Olshansky, Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Richard B. Kellam, Senior Judge.

Argued: February 10 1983
Decided September 19, 1983

Before SPROUSE and ERVIN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Paul M. Lipkin (Goldblatt, Lipkin, Cohen, Anderson, Jenkins & Legum, P.C. on brief) for appellants; Sidney H. Kirstein (McRorie, Kirstein & McMahon on brief) for appellees.

BUTZNER, Senior Circuit Judge:

The Anti-Defamation League and its regional director (collectively, the League) appeal from a decision of the district court denying them attorney's fees against Lotz Realty Company, Inc., and Paul K. Lotz. We hold that the League was the prevailing party in the proceeding before the district court and, as such, is entitled to a hearing on its motion for fees.

I

The League was named as a defendant in a suit that arose out of Lotz's use

of Christian images and slogans in its real estate advertising. After receiving a protest about this practice, the League filed a complaint with the Department of Housing and Urban Development and the Virginia Real estate Commission. The complaint was filed under the Fair Housing Act, 42 U.S.C. § 3604(c) (1977), and the Virginia Fair Housing Law, Va. Code Ann. § 36-88 (1976 & Cum. Supp. 1983), both of which proscribe housing discrimination based upon religion.

Both the Department and the Commission, after separate investigations, found reasonable cause to believe that Lotz's advertising did violate the law guaranteeing fair housing. The Department and the Commission arranged a conciliation meeting with Lotz to which the League,

as the complaining party, was invited. At the conciliation meeting, Lotz, while agreeing to modify its use of Christian symbols and slogans, refused to eliminate them entirely. The Department, the Commission, and the League, all rejected the proposed modifications. The conciliation meeting ended with an "understanding" that a proposed agreement would be submitted to Lotz. At the request of the Department and the Commission, counsel for the League prepared the proposed agreement, and it was given to Lotz. Without awaiting final agency action, Lotz filed suit in federal district court.

Lotz's complaint contained two counts. The first count was directed against the Department, the Commission, and the League. In it Lotz requested a declaration that the use of Christian

slogans and symbols and slogans was protected speech within the first amendment, injunctive relief against further complaints and administrative proceedings, and an award of costs and attorney's fees. Jurisdiction for this court was based on 28 U.S.C. § 1983 and charged the Commission and the League with conspiring to deprive Lotz of his constitutional rights under the color of state law. It requested a declaratory judgment that the symbolism was constitutionally protected, an injunction preventing the Commission and the League "from threatening or bringing further complaints or administrative proceedings," and an award of costs and attorney's fees.

Prior to trial, the Department was dismissed as a defendant under Count I because its administrative decision was

not yet "ripe" for judicial review. After trial, the district court dismissed the § 1983 claim against the Commission and the League. Consequently, Count II was dismissed. The district court then abstained from deciding Count I and dismissed Lotz's complaint.

The League moved for attorney's fees under 42 U.S.C. § 1988. The district court denied the motion on alternate grounds. First, it held that the § 1983 claim was subordinate to the declaratory judgment action under the Administrative Procedure Act and § 1331. Because Count I was not decided on its merits, but rather was dismissed because of prudential considerations, the court held that the League was not a prevailing party. The court also noted that it did not have enough information

to determine the propriety or amount of such an award. The League now appeals.

II

A review of the cases under § 1988 reveals certain principles concerning the award of attorney's fees in a civil rights action. First, it is clear that defendants as well as plaintiffs are entitled to an award of fees. The language of the statute does not distinguish between plaintiffs and defendants, stating only that "prevailing parties" may receive a reasonable attorney's fee. See Hughes v. Rowe, 449 U.S. 5, 14 (1980); Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978). Second, to be a prevailing party under § 1988, a party "need not prevail on all issues if a significant one is resolved" in its favor. Bonnes v. Long, 599 F.2d 1316,

1318 (4th Cir. 1979). See Hanrahan v. Hampton, 446 U.S. 745, 758 (1980). Finally, the standard for deciding a defendant's motion for attorney's fees is different from that used when a plaintiff has made the motion. For a defendant to succeed, he must show that the plaintiff's claim "was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Christiansburg, 434 U.S. at 422. See Hughes, 449 U.S. at 14.

III

Here it is clear that the League was the prevailing party on Lotz's § 1983 claim. The district court stated explicitly that "there can be no liability on defendants under the facts of this case." Consequently, it denied the injunctive relief that Lotz was

seeking against the League. Prevailing on this issue alone would, under Bonnes, be enough to characterize the League as the prevailing a party for the purposes of a motion under § 1988.

Moreover, it is clear that even accepting the district court's characterization of Lotz's suit as one mainly for declaratory relief, the League was simply not a party to the action in Count I which requested that relief. The declaratory judgment count centered on the dispute between Lotz and the Department and the Commission over the applicability of the first amendment to Lotz's advertising in the context of federal and state fair housing acts. The League's only connection to this dispute was as a complaining party. The League is not charged with conciliation under the acts, and it does not have the

authority to prosecute violations of the act. Its only role under the acts is that given to any private citizen -- namely, to bring a complaint of discrimination under 42 U.S.C. § 3610(a) and Va. Code Ann. § 36-94.

We note also that Count I is jurisdictionally defective with respect to the League. Count I was premised on the Declaratory Judgment Act, the Administrative Procedure Act, and general federal question jurisdiction. In the context of general federal questions, it is difficult to see how the League, a wholly private party with no enforcement or investigative powers, can under these circumstances be a defendant under § 1331. Counsel for Lotz, recognizing this fact, attempted to use the declaratory judgment act, 28 U.S.C. § 2201, as the jurisdictional

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base upon which the League could be sued. Jurisdiction, however, cannot be rested on the Declaratory Judgment Act. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950).

Consequently, it is clear that in all aspects of the case with which it was involved, the League was the prevailing party.

IV

On remand the district court should determine whether the League is entitled to an award of fees under the standards of Christiansburg. In deciding whether Lotz's action was "frivolous, unreasonable, or without foundation," subjective intent is irrelevant. Christiansburg, 434 U.S. at 421. Instead, the district court should examine the suit against the background of the law at the time of filing and the

facts then known to Lotz. It should also take into consideration the League's involvement in the suit as only a private citizen exercising a statutory right in good faith. Moreover, the district court should consider not only the deterrent effect of such an award against Lotz and other future claimants but also the chilling effect that no award may have on future potential complainants under the federal and state housing acts. Here the court should take into consideration the League's unique position as a private attorney general who asserted the rights of the public against an arguable act of discrimination.

Should the district court find that the League is indeed entitled to an award of attorney's fees, such an award should cover all stages of litigation,

including this appeal. The award, of course, must be based upon reasonable fees proven by the League. See Anderson v. Morris, 658 F.2d 246, 248-49 (4th Cir. 1981).

VACATED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

LOTZ REALTY CO., INC., and PAUL K. LOTZ,	)	
Plaintiffs,	)	FILED JAN. 25, 1984
v.	)	
VIRGINIA REAL ESTATE COMMISSION; and RICHARD C. KAST; and ANTI-DEFAMATION LEAGUE; and NORMAN OLSHANSKY,	)	CIVIL ACTION NO. 81-82-NN
Defendants.	)	

OPINION AND ORDER

Following a remand of this case and a direction to the Court to "determine whether the League is entitled to an award of fees under the standard of Christiansburg" [Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694 (1978)], page 6 of slip opinion, this Court, by order of October 27, 1983, directed counsel to file such memoranda, papers, proofs and briefs as they

desired the Court to consider on the issue, giving attention to the matters as set out in the Fourth Circuit's opinion, and to notify the Court if they desired to be heard orally.

Subsequent to said order, counsel for League filed a petition for award of attorney's fees, along with a fee statement, affidavit and a brief in support thereof. Counsel for plaintiffs filed briefs in support of their contentions. Requested oral argument was heard on January 13, 1984.

The Court must determine whether League is entitled to recover attorney's fees in this case and the amount of such fees.

I.

The differences between the parties to this action arose as the result of

certain language and symbols used in advertisements published by plaintiffs advertising their real estate business. Observing the advertisements, Norman Olshansky, Regional Director of Anti-Defamation League, complained to the United State Department of Housing and Urban Development (Housing), and to the Virginia Real Estate Commission. Written complaints were filed with Housing, following which Housing advised it was sending the complaints to the Virginia Real Estate Commission (Commission). The Commission advised plaintiffs of the complaint, the contents of the complaint, and that, in its opinion, plaintiffs were in violation of the Virginia Fair Housing Law, and the Fair Housing Regulations of the Virginia Real Estate Commission; that pursuant to Code of Virginia,

Section 36-88(3), it was an unlawful and discriminatory practice to publish advertisement of the sale or rental of dwelllings which contained discriminatory language or symbols; that the language and logogram or symbol used appeared to be in violation of the statute; and that the Commission found reasonable cause to believe the advertisement did violate the statute. The Commission recommended that plaintiffs cease the advertisement, otherwise the "Commission may schedule a hearing to revoke or suspend your license," or the Attorney General "may file suit to enjoin" further use. (Exhibit 8)

Considerable correspondence passed between Olshansky on the one hand, and Housing and Commissioner on the other. The outgrowth was that a conciliation

conference was scheduled at which plaintiff, with counsel, League, and Olshansky, with counsel, and representatives of Housing and Commission appeared. Considerable discussion took place. No agreement was reached, but the conference ended with counsel for League and Olshansky agreeing to prepare and submit a proposed agreement. Housing submitted suggested provision for the agreement. Counsel for League and Olshansky drafted a proposed agreement and sent counsel for plaintiff a copy. Among other things, the agreement, as drafted, required plaintiffs to cease the use of the language and logogram and symbol in question; that future advertising must use specified language; that whenever plaintiff advertised in two named newspapers and one named magazine,

plaintiff would, during the same week, advertise the same properties in publications and/or media targeted for circulation toward minority races and religions; that it would advertise its available properties once a month in the geographical areas in which it did business in publications and media targeted for circulation toward minority races and religions; that the agreement would be made known to all employees; that employees would be given special training and orientation, the plan for which League and Housing could implement; that all signers of the agreement would be invited to attend training sessions; that reports would be made to Housing and Commission and they would be entitled to oversee compliance with the agreement; that if plaintiffs were found in violation of the federal

or state housing laws, that in addition to other remedies, liquidate damages of $5,000.00 would be awarded; that plaintiffs should pay League's attorney's fees incurred during the pendency of the matter; and numerous other provisions. (See Exhibit 58).

Plaintiff did not accept the proposed conciliation agreement and this action followed. Neither this opinion, nor anything said herein, is intended to suggest there was any duty or obligation upon plaintiffs to agree to the terms of the proposed agreement.

II.

The complaint filed herein asserted that jurisdiction of Count I arose under 5 U.S.C. Section 701, et seq.; the Declaratory Judgment Act, 28 U.S.C. Section 2201; the federal constitution, and 28 U.S.C. Section 1331(a); and

general principles of federal pendent jurisdiction. In Count I the complaint set forth plaintiffs used the slogan and logogram or symbol in question; that League and Olshansky had filed a complaint with Housing and Pelle, alleging a violation of 42 U.S.C. Section 3604(c) of the Fair Housing Act, which had been forwarded to the Commission, charging a violation of Virginia Code Section 36-83(3); that to avoid litigation, plaintiffs had agreed to modify their slogan or symbol, but defendants would not agree; that defendants contend plaintiffs must cease all business advertisements employing any type of slogan or symbol which might be interpreted by the public to have religious overtones; that plaintiffs have a First Amendment right to use such symbols, slogans and logograms, and they

prayed the Court declare plaintiffs have a constitutional right to use the slogans and symbols; that the Court enjoin defendants from threatening to bring further complaints of administrative proceedings against them, and award plaintiffs their costs and attorneys fees.

Count II asserted jurisdiction pursuant to 28 U.S.C. Section 1343(3) and asserted the cause of action arose under 42 U.S.C. Section 1983. Count II, by reference, realleged the facts alleged in Count I, and asserted that the Commission, Kast, League and Olshansky acted in concert and under color of state law to deprive plaintiffs of their rights and privileges under the Constitution and laws of the United States.

Defendants responded, asserting the Court lacked jurisdiction; that the complaint failed to state a cause of action, and so on. The motions to dismiss were denied and defendants answered. After discovery, defendants filed motions for summary judgment. Housing and the individual federal defendants were dismissed and the case proceeded to trial as to the other defendants.

In a written opinion filed June 24th, the Court found plaintiffs were not entitled to recover under 42 U.S.C. Section 1983, and the action based thereon was dismissed. Since the first count of the complaint and remaining cause of actions turned on the construction of a state statute, the Court abstained and left the matter for determination by the state courts.

There was no appeal from these findings. However, League moved for an allowance of attorney fees, which was denied. Appeal was taken on that issue. The Court of Appeals found that League was the prevailing party on the 1983 claim, and that "[P]revailing on this issue alone would, under Bonnes[1] be enough to characterize the League as the prevailing party for the purpose of a motion under Section 1988."[2] ____ F.2d _____, (4th Cir. 1983, No. 82-1700), p. 5, slip opinion. The Fourth Circuit opinion further directed the Court to consider whether the League is entitled to an award of attorney's fees under the standard of Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694 (1978).

Further, the Court of Appeals decided that League was not a party to

the action in Count I; that its only connection was as a complaining party, and its only role under the Act was that given to any private citizen of bring a complaint of discrimination under 42 U.S.C. Section 3610(a), and Code of Virginia Section 36-94; that the Court take into consideration the League's involvement in the suit as only a private citizen exercising a statutory right in good faith; that the Court should consider the deterrent effect of such an award against Lotz and other future claimants and the chilling effect that no award may have on future potential complaints under the federal and state housing acts; and to take into consideration the League's position as a private attorney general; and that any award should cover all stages of litigation, including the appeal.

III.

In making a determination of whether an action was frivolous or without foundation so as to entitle a defendant to a recovery of attorney's fees, a defendant is not required to show that the action "was brought in bad faith." Christiansburg, supra, 434 U.S. at 419, 98 S.Ct. at 699. Little help is found in the statute as it only provides that "the Court, in its discretion, may allow the prevailing party. . . a reasonable attorney's fee. . ." 42 U.S.C. Section 1988.

The right of a defendant to recover an attorney's fee depends upon "quite different equitable considerations", Christiansburg, supra, 434 U.S. at 419, 98 S.Ct. at 699, from those entitling a plaintiff to the right to recover, and a plaintiff should not be

"assessed his opponent's attorney's fees unless a court finds that his claim is frivolous, unreasonable or groundless, or that the plaintiff continued to litigate after it clearly became so." Christiansburg, supra, 434 U.S. at 422, 98 S.Ct. at 701.

A review of prior discussions does not provide a consistent plan, rule or pattern to declare a claim frivolous, Burger King Corporation, ____ F.2d ____, (4th Cir. 10/5/83, No. 81-1697, reviewed numerous decisions of the courts dealing with this issue. At best, it is much a matter of discretion of the trial court, a discretion which is subject to review, and to be determined from all of the facts and circumstances.

In this case, League was made a party and required to defend against a

claim allegedly arising under 42 U.S.C. Section 1983. The complaint asserted that League acted in concert with others and under color of state law to deprive plaintiffs of their constitutional rights. Such a claim was without evidence of support and without merit, particularly as to League. Being without merit as to League, League is entitled to recover its attorney's fees expended herein.

IV.

In making an award of attorney's fees, no one factor will control, and no one means of measure of the amount awarded is exclusive. Consideration must be given to the factors set out in Johnson v. Georgia Highway Express, Inc., Kimbrell's Inc. 577 F.2d 216 (5th Cir. 1978) and Anderson v. Morris, 658 F.2d 246 (4th Cir. 1981),

the quantity and quality of counsel's legal work, Blankenship v. Schweiker, 676 F.2d 116 (4th Cir. 1982), and the hourly rate as discussed in Anderson v. Morris, supra. In Arnold v. Burger King Corp., supra the Court said that a starting point for determining the appropriate amount of the award is found in multiplying the number of hours reasonably expended by the reasonable or customary rate, and an adjustment of that amount upward or downward in light of the relevant considerations provided for in the cases. In the appropriate case, consideration should be given to the relative financial positions of the litigants. The guiding line should be the reasonable value of the services rendered. See Arnold v. Burger King, Corp., supra, and Ballard v.

Schweiker, ____ F.2d ____ (4th Cir. 1/12/84, No. 82-1622(L) et al.

League's counsel filed a petition for award of attorney's fees of $11,170.00 and costs and expenses of $2,270.78. To its petition it attached an itemized statement of the hours devoted to the case in the District Court and Court of Appeals, and an affidavit of correctness. The statement shows 68.2 hours were devoted to the case on the trial level, 34 hours on the appeal level, and 9.5 hours in preparation of the statement and affidavit and memo in support thereof. Costs taxed through trial amounts to $1,387.50, and in the appellate court $883.28. Plaintiff raises objection to the amount of time charged, and to certain items of cost, such as $765.40 paid The Research Group; $302.15 for

copy of depositions; $319.95 for photocopies and postage; and $250.00 for travel and expense in connection with appearance to argue the case in the Court of Appeals. Though the item for The Research Group seems high, had defendants' counsel done the research himself, he would have been entitled to charge for it. If copies of the depositions were required for a proper preparation of trial or used at trial, they are proper items to be assessed as costs. Much the same applies to photocopies. The attorney's fee is charged at a rate of $100.00 per hour out of court, and $125.00 per hour for time spent in court.

The hourly rate charged in the area varies between lawyers and law firms. A party litigant has the right to seek representation from a lawyer of his

choosing. If he is improperly sued and entitled to an award of his attorney's fees, he is to be made whole. But, that does not mean that he may employ counsel at an exorbitant hourly rate, and place that burden on his opponent; all of which points out that any award must be reasonable.[3]

The Court offered counsel the opportunity to present such depositions, affidavits or other proof as they wished, relative to this issue. The affidavit filed with the petition is the only proof submitted. Counsel for each side appeared and argued the matter orally, but offered no evidence. The only information before the Court as to the financial condition of either party were statements of counsel during oral argument, not evidence.

The Court, like many others, is much concerned over the costs of litigation. Considering that League was only one of several parties to this litigation, what then was the total cost of litigation? While that is not the issue here, it is of importance and has a bearing on the issue before the Court. Even so, considering the facts before the Court on the issue of the attorney's fee and costs, the Court cannot say that the time expended and the hourly rate charged is not reasonable. Judgment will, therefore, be entered for League to recover plaintiff its costs herein of $2,270.78 and attorney's fees of $11,170.00 for a total of $13,440.78. The Clerk will enter judgment.

_____

United States District Judge

Norfolk, Virginia

January 25, 1984

ENDNOTES

1/ Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979).

2/ 42 U.S.C. § 1988

3/ The amount to be fixed for allowance of attorney's fees to opposing counsel, in general, is like alimony, any sum is too much to pay and too little to get.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
(UNPUBLISHED)

No. 84-1321

Lotz Realty Co., Inc.
and
Paul K. Lotz, Appellants,
versus

Virginia Real Estate Commission;
Richard C. Kast;
Anti-Defamation League and
Norman Olshansky, Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Richard B. Kellam, Senior District Judge. (81-82)

Argued: October 29, 1984
Decided: December 6, 1984

Before SPROUSE and ERVIN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Sidney H. Kirstein (McRorie, Kirstein & McMahon on brief) for Appellants; Paul M. Lipkin (Goldblatt, Lipkin, Cohen, Anderson, Jenkins & Legum, P.C. on brief) for Appellees.

PER CURIAM:

Lotz Realty Co., Inc., and Paul K. Lotz appeal from the district court's order awarding attorney's fees in favor of the Anti-Defamation League. We affirm.

The League was named as a defendant in a suit that arose out of Lotz's use of religious images and slogans in its real estate advertising. After a bench trial, the district court dismissed the complaint against the League, but it declined to award it attorney's fees under 42 U.S.C. § 1988.

On appeal by the League, this court vacated the district court's order denying attorney's fees. Lotz Realty Co., Inc. v. United States Department of Housing and Urban Development, 717 F.2d 929 (4th Cir. 1983). The district court was directed to reconsider the League's entitlement to attorney's fees under the standards of Christiansburg Garmet Co. v. EEOC, 434 U.S. 412 (1978). Any award was to be made based upon reasonable fees proven by the League. Anderson v. Morris, 658 F.2d 246 (4th Cir. 1981).

On remand, after an evidentiary hearing, the court held that the League was entitled to attorney's fees under the Christiansburg standard and made an appropriate award. Its calculation of the award conforms with the standards explained in Blum v. Stenson, _____ U.S. _____, 104 S. Ct. 1541 (1984).

Lotz then filed a motion seeking a new trial or an alternation of the district court's judgment based on arguments not previously presented. The district court properly denied this motion.

Upon consideration of the record of this entire proceeding, as well as the briefs and arguments of counsel, we find no error of fact or law in the opinion and order of the district court awarding attorney's fees. Lotz Realty Co., Inc. v. Virginia Real Estate Comm'n, Civil Action No. 81-82-NN (E.D. Va. Jan. 25, 1984).

AFFIRMED.

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

COMMONWEALTH OF VIRGINIA, ex. rel. VIRGINIA REAL ESTATE COMMISSION,	)
Complainant,	) FILED 5/16/84
v.	) In Chancery No. 1226A-FB
LOTZ REALTY CO., INC.	)
and	)
PAUL K. LOTZ,	)
Respondents.	)

DECREE

This matter came on to be heard on February 14, 1984 solely on the Respondents' Cross-Bill for declaratory judgment that Respondents may lawfully utilize the symbol of the fish together with the phrase "Jesus Is Coming" and a disclaimer in connection with Respondents' business as real estate brokers. The Commonwealth of Virginia contends that the pertinent advertisement violates the Virginia Fair Housing

Act, Virginia Code Section 36-88(3). The parties have presented live testimony and briefed their respective positions.

Upon mature consideration of the foregoing, it is the finding of the Court that the pertinent advertisement does not indicate any preference, limitation or discrimination or show an intention to make any such preference limitation or discrimination and that the Commonwealth has failed to carry its burden of proving that the pertinent advertisement indicates any such preference, limitation or discrimination or shows an intention to make any such preference, limitation or discrimination. The reasons for this determination are set forth in the Court's Memorandum Opinion dated March 28, 1984.

Further, upon mature consideration of the Commonwealth's Motion to Reconsider filed on April 27, 1984, it is the finding of this Court that the decision of March 28, 1984 was right and proper, and the Motion to Reconsider is denied.

WHEREFORE, it is ADJUDGED, ORDERED and DECREED that Paul K. Lotz and Lotz Realty Company, Inc. may lawfully utilize the said advertisement in connection with their real estate business. A copy of the said advertisement is attached to the Court's aforesaid Memorandum Opinion. This finding and conclusion being dispositive of the controversy on the Cross-Bill for Declaratory Judgment, consideration of the constitutional questions raised by the parties is unnecessary.

ENTER: 5/16/84

_____
Fred W. Bateman, Chief Judge

SEEN:

_____p.d.
Sidney H. Kirstein

SEEN AND OBJECTED TO:

_____p.q.
John S. Morris, III